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July 20, 2006

Supreme Court Clerk
Michigan Supreme Court
PO Box 30052
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RE: ADM File No. 2005-19
Proposed Amendment of Rules 2.512, 2.513, 2.514, 2.515, 2.516, 5.14

To Whom It May Concern:

I have read the proposed amendments above cited and have some grave concerns about many of the provisions contained therein.

First, in my experience many cases are routine and a mandated submission of written requests for jury instructions would be unnecessarily burdensome to the attorneys and to the court. In the routine case, it is my custom to advise the attorneys in advance of which standard jury instructions I expect to give and to invite requests for any special instructions. Then, at a convenient time before final arguments, I review with the attorneys on the record the instructions as they will be given and rule on any special requests which may have been submitted. The proposal seems to require written requests as to all instructions and to prohibit the practice which I have above outlined.

Secondly, I'm not sure that it's necessary to require submission of the written instructions to the jury in printed form. Certainly, it would be appropriate to provide that the court may do so in its discretion or upon the request of counsel. However, the mandate may be unnecessary.

I am extremely bothered by the proposal to allow the parties to present interim commentary during the trial [MCR 2.513 (D)]. Such a practice would indulge

attorneys in the opportunity to grandstand, to distract the jury from the issues, and to delay the progress of the trial by unnecessary arguments at inappropriate times. Furthermore, such commentary during the course of the trial is inappropriate since arguments should be made only after the jury has had the opportunity to hear all of the evidence. Otherwise, they might be too easily misled and distracted.

For the same reason, I believe that the proposed amendment at 2.513 (E) is very ill advised. Reference documents as contemplated by the rule would be an invitation to counsel to submit inadmissible evidence which properly should be excluded by the rules of evidence. Furthermore, such reference documents would invite attorneys to editorialize and to misrepresent facts not in evidence. If the goal is to provide the jury with copies of relevant statutes and documents, provision should be made instead to have them admitted as some form of trial exhibit upon which the court can rule as to both admissibility and relevance.

The proposal to summarize deposition testimony in lieu of reading the deposition into the record seems to me to be outrageous. It should be for the jury, not the attorneys, to decide what is said in deposition that is persuasive to the jury. It makes no more sense to summarize deposition testimony than it would make sense to try an entire case outside the presence of the jury and then submit a summary of the testimony received in open trial to a jury for decision.

Proposed rule 2.513 (G) (3) proposes that a panel discussion by experts on a subject be permitted after or in lieu of testifying. If we have learned anything from the quadrennial presidential debates, it is that the debates are uninformative, misleading, and disingenuous. Even though it is proposed that such a panel discussion be moderated by a neutral expert or by the trial judge, I can't help but believe that any moderator would be likely, however well intentioned, to accidentally let some of his or her own personal biases and prejudices intrude upon the moderation process.

In the interests of truth and justice would be much better served by continuing the present practice of letting the advocates examine and cross-examine each of the experts in turn in order to most fully and accurately enlighten the jury as to the questions upon which they offer their expert opinions.

Proposed rule 2.513 (K) would allow the jury to conduct interim discussions regarding the case during the pendency of the trial and before having heard all the evidence, the instructions or the arguments. What an invitation to uninformed decision making! The jury is very likely to have made up its mind in advance of having heard any of the instructions or arguments if this rule is adopted. The whole point and purpose of arguments and instruction is to focus the jury and the

deliberations of the jury on the law as it applies to the facts which have been presented to them during the course of the trial. Without advice concerning the law to be applied to the facts, the jury may very well have reached a conclusion based on a total misunderstanding of what the law is as it applies to the case submitted to them for decision.

Next, I am very disturbed by the proposed rule 2.513 (M) which would allow the court to sum up the evidence and comment to the jury about the weight of the evidence. That seems to me without question or debate to be a province of the advocate. It is human nature to let one's opinions show through, no matter how subtly. I would be terribly afraid that I, or any Judge, no matter how well intentioned, would inadvertently let our own personal opinions become apparent in our commentary on the evidence, even if only by our intonation and emphasis. That, I think, is a danger which should be avoided by not adopting the proposed rule.

Next, I am uncomfortable with the idea under proposed rule 2.513 (N) (4) soliciting questions from the jurors as to the issues that divide or confuse them. In my experience, if the jury needs further clarification, they are not too shy to submit the question to the court on their own initiative.

Finally, proposed rule 2.514 (C) (3) permits discharge of a jury whenever an adjournment is declared. As defined by Black's Law Dictionary an adjournment is not necessarily the conclusion of a proceedings and is only final if it is an adjournment sine die. Therefore, I believe the word adjournment is used in-artfully and that the proposed rules should be redrafted.

I am not sure from whence came the initiative to draft the proposed changes of the rules. However, someone perceives problems with the existing state of affairs that I think are nonexistent. This seems to be a case of: "if it ain't broke, don't fix it." The proposed rules in many ways trash a process that has worked for centuries. As a result, the effort to reinvent the wheel seems to have resulted in an oval rather than a circle, and if the rules are adopted, we are indeed in for a rough ride.

Very truly

W. Wallace Kent, Jr.
Judge of Probate/Family Court

cc: Honorable Milton L. Mack